United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 31, 2001

TO : Celeste J. Mattina, Regional Director

Region 2

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Office & Professional Employees

International Union, AFL-CIO, and 536-2581-3307-5000 Local 153 OPEIU, AFL-CIO 536-2581-3307-5030 (New York Stock Exchange) 536-2581-3307-5040 Case 2-CB-17965 536-2581-3307-5050

This $\underline{\operatorname{Beck}}^1$ 8(b)(1)(A) case was submitted for advice as to whether the Union failed to provide the Charging Party with adequate and audited financial information and information regarding affiliates, and/or overcharged for political and non-representational activities by affiliates.

FACTS

The Charging Party has been employed with the New York Stock Exchange (the "Employer") for approximately five years. During that time, he was a member of OPEIU Local 153 (the "Union"), a constituent local of the Office & Professional Employees International Union (the "International").

In December 1997, the Charging Party advised the Union that he was resigning from the union and requested information regarding paying a service fee under the union security clause.

By letter dated February 5, 1998, the Employer informed the Charging Party that it was discontinuing dues checkoff and that he must pay union dues directly to the Union.

On June 9, 1998, the Union advised the Charging Party that he was in the arrears from April 13, 1998, and that payment of dues was a condition of his employment. By letter dated June 29, 1998, the Charging Party advised the International that he had resigned from the Union and requested information regarding service fees he was

¹ CWA v. Beck, 487 U.S. 735 (1988).

required to pay. He further indicated that he wished to pay "the minimum amount to cover the collective-bargaining process." When the Charging Party did not receive instructions from the Union or the International regarding the amount he was required to pay, he remitted payments in July and September of 1998 based upon the rate for his 1997 dues.

By letter dated January 25, 1999, the Union acknowledged receipt of the Charging Party's notice of "intent to become a <u>Beck</u> fee-paying objector." The Union advised the Charging Party that it was implementing a new procedure for objectors, that further information would be forthcoming and that he would receive a full rebate for any dues paid for non-representational costs. By letter dated February 5, 1999, in response to the Union's letter, the Charging Party requested a refund for all of 1998 and January 1999. On June 29, 1999, the Charging Party reiterated his wish to be treated as a Beck objector.

By letters dated March 8 and 27, 2000, the Union acknowledged the Charging Party's notice of objector status and informed him of the percentage and dollar amounts of his reduced agency fee. The Union enclosed statements of disbursement that allocated non-chargeable and chargeable costs for the 1997 and 1998 fiscal years, which were the same as the calendar years.² The Union's expenditures were broken down into approximately 50 different categories that included salaries, rent, electric, telephone, pension, OPEIU dues, and payments to other affiliates. The Charging Party's objector fees were calculated for the period from September 1, 1998 through August 31, 1999 based on the Union's 1997 statement of disbursement. His objector fees were calculated for the period from September 1, 1999 through August 31, 2000 based on the Union's 1998 statement of disbursement. An independent accounting firm prepared the statements based upon its independent verification that the asserted payments were made. The information provided by the firm was based upon previous audits the firm had conducted in its regular course of business as the Union's accountant.

The Charging Party was also informed that his status as an objector did not relieve him of his responsibility to

² Also enclosed were statements of disbursement that allocated non-chargeable and chargeable costs for the International for fiscal years 1997 and 1998. That fiscal period was from March to February.

pay agency fees, and that he was in arrears \$508.92 for the period April 1998 through February 2000.

By letter dated April 10, 2000, the Charging Party advised the International that he was challenging both the Union's and the International's classification of expenditures and would present his case before an arbitrator. 3 On May 5, 2000, the Charging Party remitted agency fees for the period that he was in arrears. 4

ACTION

We conclude that the Region should issue a Section $8\,(b)\,(1)\,(A)$ complaint, absent settlement, alleging that the Union overcharged the Charging Party for political and non-representational expenses. The other allegations should be dismissed, absent withdrawal.

1. Adequacy of the Break Down of Expenditures in Union's Disclosure

In <u>California Saw & Knife Works</u>⁵ the Board held that unions should be measured by the duty of fair representation standard when they exact funds from objecting nonmembers under a union security clause.⁶ Under that standard, fees must be reduced to reflect only the union's representational expenditures once a nonmember objects to the union's use of the fees for non-representational purposes. The union must inform the objector of the percentage of the reduction and the basis

³ The Union initiated an arbitration proceeding before the American Arbitration Association and the case was set for hearing on December 18, 2000.

 $^{^4}$ The Union asserts that the Charging Party has not remitted any further agency fees and is in arrears from April 2000 through the present.

 $^{^{5}}$ 320 NLRB 224 (1995), enfd. sub nom. Machinists v. NLRB, 133 F.3d 1012 (7th Cir. 1997).

⁶ <u>Teamsters Local 75 (Schreiber Foods)</u>, 329 NLRB No. 12, slip op. at 3 (1999) (duty of fair representation is met if union supplies its major categories of expenditures and verified figures).

for the calculation, and of his right to challenge the figures.

However, the Board also held in <u>California Saw</u> that unions are not required to disclose all of their expenditures at the initial disclosure stage of a union's response to a <u>Beck</u> objection. Rather "unions are required only to identify their *major* categories of expenditures, broken down into chargeable and non-chargeable allocations." The disclosure only needs to provide the objector with sufficient information to determine whether to challenge the union's assertions. The Board in <u>Dameron Hospital</u>, above, specifically rejected the approach that financial information regarding affiliates' expenses should be broken down at the disclosure stage, and found that such information is required only after a challenge by the objector.

The Charging Party alleges that the information provided was inadequate in that it did not break down the affiliates' allocation of representational and non-representational expenditures. However, the Union listed the fees paid to the International and other affiliates as major category expenditures, with 100% of those expenses listed as chargeable. This provided the Charging Party with sufficient information to determine whether to dispute the amounts claimed by the Union. The Charging Party in fact challenged the Union's assertion regarding several of the affiliates based upon the information provided. Thus, this allegation should be dismissed absent withdrawal.

⁷ Office Employees Local 29 (Dameron Hospital Assn.), 331 NLRB No. 15, slip op. at 3 (2000).

⁸ Schreiber Foods, 329 NLRB No. 12, slip op. at 3. See also
California Saw, 320 NLRB at 237; Teamsters Local 166
(Dyncorp Support Services), 327 NLRB No. 176, slip op. at 7
(1999), enf. denied sub nom. Penrod v. NLRB, 203 F.3d 41
(D.C. Cir. 2000).

⁹ Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000) (union's disclosure must break down per capita fees sent to affiliates) does not reflect the Board's current view on this issue.

2. The Adequacy of the Audit

In California Saw, the Board used the term "audit" when it described the verification of expenditures that must be provided to an objector. 10 The Board held that the obligation to provide audited statements was met when an accountant independently verified that the expenditures were made as presented in the major categories. The purpose of the audit requirement is to provide the objector with a reliable basis to determine whether to challenge the union's assessment. 11

Here an independent accounting firm confirmed that it derived the information contained in the statements from audits that it had previously conducted of the Union's financial statements for 1997 and 1998. The firm also confirmed that it independently verified the information. The purposes of requiring an independent audit were met, and it should not matter whether that audit was conducted at one time or from compilations of earlier audits. Thus, the Union adequately complied with this Beck obligation.

3. Overcharging for Overhead Expenses

A Charging Party who files a Board charge alleging that a particular expenditure asserted by the union as chargeable is in fact not chargeable must present evidence or give promising leads that would lead to evidence to support that assertion. 12 In order to establish that an objector was overcharged for overhead, the General Counsel must demonstrate the relationship between each nonchargeable activity and each of the overhead items involved. 13 The Board will not presume that overhead expenses were incurred for non-representational matters in the same share that the union incurred non-overhead expenditures for such matters. 14

¹⁰ 320 NLRB at 240-242.

 $^{^{11}}$ AFTRA (KGW Radio), 327 NLRB No. 97, slip op. at 4 (1999).

^{12 &}quot;Guidelines Concerning Processing of Beck Cases," GC Memorandum 98-11, dated August 17, 1998.

¹³ Teamsters Local 401 (UPS), Cases 4-CB-8115, 8310, Advice Memorandum dated September 20, 1999.

The Charging POarty has alleged that the Union overcharged for overhead because it treated overhead as 100% chargeable despite the fact that the Union incurred some non-representational costs during the year. However, since the Charging Party has provided no evidence that any overhead expenses were specifically attributable to non-representational activities, he has not adequately demonstrated that the Union improperly charged for any of the categories of its overhead expenses. Thus, this allegation should be dismissed. 15

4. Charging for non-representational expenditures of affiliates

The Charging Party alleges that the Union overcharged him for political and other non-representational activities conducted by the Union's affiliates. In support of that assertion, the Charging Party has presented the Region with copies of Internet web pages demonstrating that political activity was conducted by two of the Union's affiliates, the New York State AFL-CIO and the New York City Central Labor Council. For example, the New York State AFL-CIO sponsored a "Day of Action" and "1,000,000 flyers" to

¹⁴ See <u>Teamsters Local 75 (Schreiber Foods)</u>, above (Board will not presume that some of the union's salary expense would have to be attributable to the union's non-representational activities).

¹⁵ See <u>Beck</u> Guidelines, above (unfair labor practice charge alleging improper agency fee charges should be dismissed if the objecting party generally asserts that he has been improperly charged). See also <u>Schreiber Foods</u>, above, slip op. 4 (when an objector "doubts...he can file a challenge, and the Union will be put to its proof...").

Teamsters Local Union No. 662 (Land O'Lakes-Spencer), Case 30-CB-4308, Advice Memorandum dated September 6, 2000 (while there may be circumstance in which challenging a union's disclosure and participating in its arbitration proceeding may be the best way for an objector to obtain information, a Beck objector does not have to resort to a union's challenge procedure in order to obtain information necessary to sustain a Board charge; an objector may utilize information obtained through other sources such as newspaper articles).

support the senate candidacy of Hillary Clinton. Additionally, the International's audited disclosure for fiscal year 1997 reflected 28.94% of its total expenditures as non-chargeable. 17

The Union's disclosure statement treats all payments to affiliates as 100% chargeable. The fees paid to the International and the other two affiliates were approximately 6% of the Union's yearly expenditures, which is clearly more than de minimus. 18 Thus, the Charging Party has presented evidence to support his assertion that he was unlawfully overcharged by the Union.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) of the Act by overcharging the Charging Party for non-representational expenditures of its affiliates. All other allegations should be dismissed, absent withdrawal.

B.J.K.

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¹⁷ Although the International has a different fiscal year than the Union, there is an overlap of 10 months.

¹⁸ See St. Louis Newspaper Guild, Local 57, The Newspaper Guild, AFL-CIO, Case 14-CB-3843, Advice Memorandum dated April 3, 1995.